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No. 82-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSE CORPORATION,

Petitioner,

—against—

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE NEW YORK TIMES COMPANY, CBS, INC., DOW JONES & COMPANY, INC., THE DUN & BRADSTREET CORPORATION, GANNETT CO., INC., NATIONAL BROADCASTING COMPANY, INC., NEWSWEEK, INC., THE READER'S DIGEST ASSOCIATION, INC., THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE MAGAZINE PUBLISHERS ASSOCIATION and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *AMICI CURIAE*

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100
Counsel for Amici Curiae

Of Counsel:

DEAN RINGEL
KENNETH E. MEISTER
DEVEREUX CHATILLON
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)

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Additional Counsel Listed on Inside Cover

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The movants are publishers, broadcasters and associations of newspaper publishers and editors, of book and magazine publishers and of journalists who join together to move this Court for leave to file a brief as *amici curiae* in this case. The

written consent of the respondent, Consumers Union, has been obtained and has been filed with the clerk of this Court. The consent of the petitioner, Bose Corporation, has been requested and refused.

The movants seek to submit a brief *amici curiae* with this Court because they share a common interest in preserving and exercising First Amendment rights held protected by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and a common concern that reversal by this Court of the judgment of the Court of Appeals would imperil those rights. The *amici* believe that those rights would be threatened by a rule of law that would subject those who describe, review, rate, evaluate and criticize the products, services, performance and activities of others to standards of verbal accuracy that are as impossible to articulate as they are to meet. In addition, in light of the nature of the constitutional issues at stake, the complexity of the subjective judgments involved in these cases—including questions of subjective intent—and the exacting standard of proof to be met, independent appellate review of the evidentiary record is, the movants believe, essential to protect both the constitutional interests at stake and the integrity of the process of constitutional adjudication.

Accordingly, movants respectfully request this Court to grant leave to file their accompanying brief *amici curiae* to present their views to this Court urging affirmance of the opinion of the Court below.

Respectfully submitted,

/s/ FLOYD ABRAMS

Floyd Abrams
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Amici Curiae

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This brief is submitted on behalf of The New York Times Company, CBS, Inc., Dow Jones & Company, Inc., The Dun & Bradstreet Corporation, Gannett Co., Inc., National Broadcasting Company, Inc., Newsweek, Inc., The Reader's Digest Association, Inc., The American Newspaper Publishers Asso-

ciation, The American Society of Newspaper Editors, The Association of American Publishers, Inc., The Magazine Publishers Association and The Reporters Committee for Freedom of the Press, as *amici curiae*.

Interest of *Amici Curiae*

The *amici* are publishers, broadcasters and associations of newspaper publishers and editors, book and magazine publishers and of journalists. The New York Times Company and its subsidiaries publish *The New York Times*, thirty other daily and weekly newspapers, books and three nationally circulated magazines, and own and operate television and radio stations and a cable television system. CBS, Inc. and National Broadcasting Company, Inc., which are engaged, through their news divisions, in the nationwide dissemination of news, operate national television and radio networks and own and operate television and radio stations. Dow Jones & Company, Inc. and its subsidiaries publish *The Wall Street Journal*, community daily newspapers, wire services, books and magazines. The Dun & Bradstreet Corporation, in addition to its well-known subscription credit information services, is also one of the country's leading publishers of business, consumer, corporate and product information including *Dun's Business Month* and approximately 30 other specialized business, technical and consumer magazines. Gannett Co., Inc. and its subsidiaries publish eighty-nine daily and thirty-two non-daily newspapers throughout the country and own and operate television and radio stations. Newsweek, Inc. publishes the weekly international news magazine, *Newsweek*, with a weekly net circulation of nearly 3 million copies nationwide. The Reader's Digest Association, Inc. publishes the monthly magazine, *Reader's Digest*, which has an average monthly domestic circulation of almost 18 million, and publishes Reader's Digest Condensed Books, trade books and general books such as *Home Improvements Manual*, *Complete Do-It-Yourself Manual*, *Back to Basics* and *Complete Guide to Needlework*.

late review of the evidentiary record is essential to protect both the constitutional interests at stake and the integrity of the process of constitutional adjudication. That is, the *amici* believe, precisely what this Court has long-since held to be the law.

Preliminary Statement

As briefed by the parties, this case involves the question of the proper scope of appellate review by a federal Court of Appeals in a case governed by *New York Times Co.* v. *Sullivan*. We address that question—one we believe was answered by *Sullivan* itself—in the remainder of this brief. Before doing so, we turn to the district court's treatment of the Consumers Union article and of the trial testimony about it. So erroneous is the district court opinion, so steeped in constitutional error are its premises, that there is reason for serious doubt that this case is even an appropriate vehicle for consideration of the permissible scope of appellate review.

The article in question reviewed various stereo loudspeakers including a distinctive product manufactured by petitioner Bose. It concluded:

> "When it came to music the [Consumers Union] panelists immediately noted a remarkable difference between the systems. The *Bose 901* seemed considerably more spacious and reverberant, actually to the point of giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position."

Then, in the only paragraph held actionable by the district court, the report stated:

> "But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the *Bose* system. Worse, individual instruments heard through the *Bose*

> system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall."

It continued:

> "With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists."
>
> • • •
>
> "As for sound quality, if the *Bose 901* had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups. The overall sound was of good quality with impressive bass, considering the small speakers. But the combination of the equalizer and the speakers tended to overemphasize the middle bass, giving it a somewhat overly full, heavy sound.
>
> "We think the *Bose* system is so unusual that a prospective buyer must listen to it and judge it for himself." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 508 F. Supp. 1249, 1253-54, 1255, 1268 (D. Mass. 1981).

The district court concluded that the *Consumer Reports* article was false (and disparaging of petitioner's stereo system) because a Consumers Union engineer wrote that the sound produced by petitioner's speakers "tended to wander *about the room*" to describe a sensory perception when that perception, the court said, should better have been described as "moving *along the wall*." (Emphasis added) Since the engineer was "an intelligent person whose knowledge of the English language cannot be questioned," the court thereupon determined that it was "simply impossible for the Court to believe that he interpret[ed] a commonplace word such as 'about' to mean anything other than its plain, ordinary meaning." *Id.* at 1276-77.

There is no other basis for the district court's finding of liability. In fact, the court rejected attacks on the good faith of Consumers Union, *id.* at 1277, and on the honesty of its staff, *id.* But in inferring actual malice from its conclusion of falsity and its own view of what a reasonable, "intelligent" man would have understood the word "about" to mean, the district court plainly violated this Court's long-standing injunction that constitutional malice may be inferred neither from falsity, nor from what a reasonable, much less "intelligent," man might conclude. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 298 n.2 (1964) (Goldberg, J. concurring); *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 10-11 (1970); *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 152 (1967).

The district court's conclusion that actual malice existed here thus cannot withstand appellate scrutiny under *any* standard. Indeed, this case provides no occasion for determining an appropriate standard of factual review at all, for the district court found no facts. It concluded—essentially on the basis of what it believed to be "the plain, ordinary meaning" of the word "about"—that Consumers Union in using that word to characterize a subjective sensory impression had acted with actual malice. The court made no findings of fact—the who, what, when, where of reality; it considered essentially undisputed "facts" in light of its understanding of actual malice. It was the district court's application of law to the facts with which the Court of Appeals properly took issue. Whatever the role of Federal Rule of Civil Procedure 52(a) in a case where fact finding has occurred, it has no application to the process by which the facts are simply assessed against the constitutional standard. That is what occurred here.

The same wooden approach which led the district court to detach one sentence in the review from the rest—and even a few words in one line from all the rest—led it into error in yet another fundamental way. This case does concern, after all, a review. The review describes uniquely subjective and difficult to articulate sensory reactions. It is no surprise in this context

that the few words at issue are preceded by language deliberately imprecise in nature—"tended to wander"—and followed by language allegorical in nature—"a violin appeared to be 10 feet wide . . . a piano stretched from wall to wall."[1] This is the language of opinion, language long held protected at common law as well as under First Amendment principles. Even at common law, reviews of art, music, literature, food, and the like enjoyed broad protection from liability under the libel laws. This Court's opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), built upon this foundation in recognizing the constitutional dimension of protection not only for reviews but for all forms of opinion.

Reviews held protected have been biting, negative—and often more than a little entertaining. The tradition of protecting such expression is long. From the now legendary havoc

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1 The elusive character of the sensory impression that the review sought to convey is reflected in the testimony (with which the district court took no issue) of the two Consumers Union engineers who participated in the listening test:

> *Seligson*:
>
> "As best as I could describe it, it would be that—if you can imagine peering at an array of lights from a distance, a very large array of lights from a distance so when you view them they seem like a blur of lights somewhere in front of you; and in this array of lights there may be individual lights which twinkle more strongly and focus one's attention upon them, but the twinkling shifts from point to point so that one's attention is drawn first to one spot, then to another, but it would be difficult to see whether at those times when one's attention shifts to a bright spot, whether one has suppressed the fact that there is a broad light source behind. This is something that occurs with time and it is a perception. It is difficult to recall precisely the manner in which I heard it, but that is about the best analogy that I could give you." (J.A. 181-82)
>
> *Lefkow*:
>
> "Yes, the piano seemed very wide in the sense that you could hear the various tones from the piano come in at many points right across the front of the room. And the violin, as the violin is played, the violin—the source of the notes seemed to change as he played different notes. As he went up and down the scale, I heard the notes coming from different points, spread out between the two speakers." (J.A. 231)

wrought by an Iowa reviewer of the "Cherry Sisters" at the turn of the century[2] to a recent review of a book about gambling,[3] from the savaging of a Louisiana restaurant[4] to a far more restrained (and *Consumer Report*-like) product review of a rifle,[5] courts have given a wide berth to the necessar-

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2 "Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the danse du ventre and fox trot,—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle."

Cherry v. *Des Moines Leader*, 86 N.W. 323 (Iowa Sup. Ct. 1901); *see generally* Gartner, *Fair Comment*, 33 American Heritage 28 (Oct./Nov. 1982).

3 "Lyle Stuart's book, Casino Gambling for the Winner—is clearly misnamed. All you will learn from this book is how to lose. I consider the publication and sale of this work to be # 1 fraud ever perpetrated upon the gambling reader."

Stuart v. *Gambling Times, Inc.*, 534 F. Supp. 170, 171 (D.N.J. 1982).

4 The escargots, the reviewer observed, "are simply pretentious failures that leave a bad taste in one's mouth" and the "ugly sauce" on the duck is such that it "makes you want to scrape off the glop to eat the plain duck"; the trout sauce was described as "trout a la green plague"; one could also choose, according to the review, from such dishes "yellow death on duck." It summarized the cuisine succinctly: "T'aint Creole, t'aint Cajun, t'aint French, t'aint country American, t'aint good."

Mashburn v. *Collin*, 355 So. 2d 879, 887-88 (La. Sup. Ct. 1977)

5 "Bore Inspection Device Performs Poorly"

"The Safe-Site Bore Scope is a device for making it easier to examine the bore of a gun that has a closed breech end. It is made of optical-grade plastic, and is supposed to permit a better view of the breech end of the bore. However, excessive distortion is present in the device and this prevents a clear view of the bore."

Safe Site, Inc. v. *National Rifle Ass'n of America*, 253 F. Supp. 418, 419 (D.D.C. 1966).

ily subjective evaluations and characterizations of products, services and performances. But in this action, the district court afforded no such constitutionally mandated "breathing space" at all.

The *Consumer Reports'* review here contains no defamatory or disparaging statements of fact. As is often the case with reviews about consumer products, the views of Consumers Union concerning the worth of the Bose system permitted the public to make a far more informed judgment regarding the nature of the product involved. To read such reviews as anything but the expression of opinion is to put at peril an entire genre of journalism which provides important practical assistance to readers every day in every type of publication. The Court of Appeals correctly held that the constitutional malice standard could not be met here; but that is only one flaw in the theory of a case that should never have been permitted to proceed at all.

SUMMARY OF ARGUMENT

That the Court of Appeals engaged in an independent appellate review of the evidentiary basis for the district court's determination as to actual malice reflects nothing more than its adherence to long-settled principles mandated by *New York Times Co.* v. *Sullivan* and its progeny.

This brief first shows that such a review is essential to assure that liability for defamation will not impermissibly intrude upon constitutionally protected communication. Together with the subjective elements of actual malice and the exacting burden of proof required to establish it, independent appellate review serves to safeguard the liberties held protected by *Sullivan*.

The brief next analyzes the purpose and scope of such review and the critical function it performs in assessing the qualitative and quantitative sufficiency of the evidentiary basis for actual malice determinations.

Finally, the brief demonstrates that the Court of Appeals was correct in concluding that the clearly erroneous standard for purely factual review embodied in Rule 52(a) has little, if any, applicability to appellate review of actual malice determinations and that the Court of Appeals appropriately followed the independent review process mandated by *Sullivan* and its progeny.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONDUCTED AN INDEPENDENT REVIEW OF THE EVIDENTIARY BASIS FOR THE DISTRICT COURT'S CONCLUSION THAT THE STATEMENT CHALLENGED WAS PUBLISHED WITH ACTUAL MALICE

A. The Requirement Of Independent Appellate Review

Three bedrock principles first announced in *New York Times Co.* v. *Sullivan* have remained as clear and unchallenged through the years as they were at their inception. The first relates to the nature of actual malice itself: a statement is only made with actual malice, this Court said in *Sullivan*, when made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. Since *Sullivan* itself, actual malice consistently has been deemed subjective in nature, provable only by evidence of actual knowledge of falsity or "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). *See also Herbert* v. *Lando*, 441 U.S. 153, 173 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 331-32 (1974); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 56 (1971); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

The second principle stems from the importance of the first. The subjective test may only be met with proof of "convincing

clarity." *Sullivan*, *supra*, 376 U.S. at 285-86. As later rephrased in *Gertz*, actual malice must be established by "clear and convincing proof." *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 342; *Rosenbloom* v. *Metromedia, Inc.*, *supra*, 403 U.S. at 52, 55; *Restatement (Second) of the Law of Torts* § 580A comment f (1977).[6]

The third principle—that at issue in this appeal—follows directly from the first two. In order to assure that the actual malice standard is properly applied and, in particular, that the heavy burden of proof on that issue is satisfied, this Court has consistently required an independent review of the record underlying a judgment based on actual malice. Thus, in *Sullivan*, *supra*, 376 U.S. at 285, this Court stated:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser* v. *Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v. *Florida*, 328 U.S. 331, 335; *see also One, Inc.* v. *Olesen*, 355 U.S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372. We must 'make an independent examination of the whole

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6 This Court has described a similarly exacting standard of proof as demonstrating " 'the degree of confidence our society thinks [the district court] should have in the correctness of the factual conclusions of a particular type of adjudication' " and "serves . . . to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U.S. 418, 423 (1979).

> record,' *Edwards* v. *South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (Footnote omitted).

Again, in *Time, Inc.* v. *Pape*, 401 U.S. 279, 284 (1971), this Court reiterated the "settled principle" that in determining whether the "constitutional rule" of actual malice has been correctly applied to the facts of a case this Court " 'will re-examine the evidentiary basis on which [the lower court's] conclusions are founded,' " *quoting Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951). *See also Rosenbloom* v. *Metromedia, Inc.*, *supra*, 403 U.S. at 53; *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, *supra*, 398 U.S. at 11; *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 730, 732-33; *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 82 (1967) (*per curiam*); *Restatement (Second) of the Law of Torts* § 580A comment g (1977).

The actual malice standard, the clear and convincing factual showing required to satisfy it, and the independent appellate review of that factual showing required to sustain it are thus the three constitutionally mandated safeguards of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *Sullivan*, *supra*, 376 U.S. at 270. Together, they provide the requisite assurance that liability for defamation will not impermissibly intrude upon communication receiving First Amendment protection.

The appellate review required by *Sullivan* and its progeny is by no means unique to defamation cases. Twenty years prior to *Sullivan*, this Court in *Baumgartner* v. *United States*, 322 U.S. 665 (1944), a denaturalization proceeding, held that where the defendant's subjective state of mind was an essential issue of fact and the plaintiff had the burden of proof on that issue by evidence that was " 'clear, unequivocal and convincing' "—language strikingly similar to that in *Sullivan* and its progeny—the entire evidentiary record would be independently reviewed to ascertain whether the exacting standard of proof had been satisfied. 322 U.S. at 671.

In *Baumgartner*, the Government alleged and the lower courts found that defendant committed fraud at the time he was granted a certificate of naturalization as a United States citizen by falsely swearing that he had renounced allegiance to Germany and would support and defend the Constitution and laws of the United States. In reversing the judgment, this Court reviewed the evidentiary record on which it was based. As Justice Frankfurter's opinion concluded:

> "[T]he case made out by the Government lacks the solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen." *Id.* at 670.

In so doing, the Court recognized:

> "The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. . . . [T]he 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court. *See, e.g., Beyer* v. *LeFevre*, 186 U.S. 114. . . . Deference properly due to the findings of a lower court does not preclude the review here of such judgments. This recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law, but that is often not an

illuminating test and is never self-executing." 322 U.S. at 670-71.

Later cases in the denaturalization area have consistently adhered to the principles set forth in *Baumgartner* and engaged in the same independent appellate review.[7]

This Court has also engaged in independent evidentiary reviews in areas of First Amendment concern other than defamation. In *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), a contempt proceeding against a newspaper editor for publishing editorials and cartoons critical of a Florida court, this Court held that it was "compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts." 328 U.S. at 335.[8]

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7 *See, e.g., Lim* v. *Mitchell*, 431 F.2d 197, 199 (9th Cir. 1970); *United States* v. *Oddo*, 314 F.2d 115, 116 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963); *Chaunt* v. *United States*, 270 F.2d 179, 181 (9th Cir. 1959), *rev'd on other grounds*, 364 U.S. 350 (1960); *United States* v. *Montalbano*, 236 F.2d 757, 759 (3d Cir.), *cert. denied*, 352 U.S. 952 (1956); *United States* v. *Anastasio*, 226 F.2d 912, 916 (3d Cir. 1955); *Baghdasarian* v. *United States*, 220 F.2d 677, 680 (1st Cir. 1955); *Bechtel* v. *United States*, 176 F.2d 741, 744 (9th Cir. 1949); *Fix* v. *United States*, 176 F.2d 746, 748 (9th Cir. 1949); *Brenci* v. *United States*, 175 F.2d 90, 92 (1st Cir. 1949).

The Courts of Appeals have also extended the standard of proof and requirement of independent review to expatriation cases. *See Norio Kiyama* v. *Rusk*, 291 F.2d 10, 17 (9th Cir.), *cert. denied*, 368 U.S. 866 (1961); *Gonzalez-Jasso* v. *Rogers*, 264 F.2d 584, 587 (D.C. Cir. 1959); *Monaco* v. *Dulles*, 210 F.2d 760, 762 (2d Cir. 1954); *Lehmann* v. *Acheson*, 206 F.2d 592, 599 (3d Cir. 1953).

8 The special role of the appellate courts in reviewing determinations of clear and present danger had long since been emphasized by Justice Brandeis. In his dissenting opinion in *Schaefer* v. *United States*, 251 U.S. 466, 483 (1920), he stated that: "[T]he judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error."

Similarly, in *Niemotko* v. *Maryland*, 340 U.S. 268 (1951), the Court reversed as violative of the First and Fourteenth Amendments disorderly conduct convictions of two Jehovah's Witnesses who had held a meeting in a public park after their application for a permit had been denied. Recognizing that the case involved a claim of denial of rights under the Constitution, the Court held that it was not bound by the conclusions of lower courts but would "reexamine the evidentiary basis" on which the convictions were founded. 340 U.S. at 271. *See also Jacobellis* v. *Ohio*, 378 U.S. 184, 189 (1963) (obscenity case in which the Court "recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts").

Following the mandate of this Court in *Sullivan* and its progeny, the Court of Appeals here undertook a careful independent review of the evidentiary basis on which the district court concluded that petitioner had satisfied its burden on the issue of actual malice. Its approach was consistent with the teaching of *Sullivan* and its progeny, and its conclusion that the burden had not been satisfied was fully warranted.

B. The Purpose And Scope Of Independent Appellate Review

It is perhaps simplest to begin by stating what independent appellate review does not entail. It does not involve a re-assessment of the credibility of witnesses or their demeanor at trial—issues which of necessity must be left to the trier of fact. Nor does it involve a re-evaluation of findings of historical fact, such as whether, when and by whom a challenged statement was made. Such findings would be properly reviewable under the clearly erroneous standard of Rule 52(a).

In contrast, independent appellate review focuses on the cumulative effect, both qualitatively and quantitatively, of the facts found by the district court. In conducting such a review, the appellate court's role is to assess (i) whether the district court properly applied the constitutional standard of actual malice to the facts and (ii) whether the facts in the record and

any inferences that may properly be derived therefrom satisfy the requirement that actual malice be established by clear and convincing proof. The purpose of the review is not to re-try the case but to scrutinize with special care what has been established and to determine if—as this Court said in *Baumgartner*—the "whole mass of evidence," properly evaluated, rises to the level of constitutional malice.

To sustain a finding of actual malice, the evidence must be both qualitatively probative of actual malice and quantitatively sufficient to meet the requirement of clear and convincing proof. Evidence, for example, that the publisher of a challenged statement failed or refused to issue a retraction or correction may well be qualitatively deficient because it is not probative of the issue of the publisher's subjective intent at the time the statement was made. *See New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 286-87 (defendant's failure to retract statement upon Alabama Governor's demand held "not adequate evidence of malice for constitutional purposes").

Similarly, where the record contains only proof of falsity or evidence that a reasonably prudent man would not have published the statement, the record would be quantitatively insufficient to satisfy the standard of clear and convincing proof as to the defendant's subjective state of mind. *See St. Amant* v. *Thompson*, *supra*, 390 U.S. at 731; *Beckley Newspapers Corp.* v. *Hanks*, *supra*, 389 U.S. at 84; *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 298 n.2 (Goldberg, J., concurring). In such a case, the quantum of evidence does not rise to clear and convincing proof of constitutional malice.

The critical role played by this review process in protecting constitutional rights and maintaining the integrity of constitutional adjudication is demonstrated dramatically by the frequency with which the Courts of Appeals have reversed district court judgments on the issue of actual malice. Since the *Sullivan* ruling by this Court in 1964, federal Courts of Appeals have ruled on the adequacy of proof of actual malice

in 61 reported defamation cases.[9] In the 41 cases appealed by plaintiffs, 10 were reversed; of the 20 appeals by defendants in which Courts of Appeals ruled on that issue, 13 (in addition to this one) were reversed. Thus, 70% of appeals of defendants with respect to findings of or rulings about actual malice led to reversals. When analysis is confined to review after a trial, 71% of defendants' appeals in cases involving rulings on actual malice have led to reversals.

Given the fact that only 19% of all civil cases heard by federal Courts of Appeals not involving the United States are reversed,[10] the strikingly high reversal rates in actual malice cases and particularly in cases in which actual malice was held to exist at the trial court level are themselves persuasive evidence of the need for the careful appellate scrutiny of actual malice determinations. This Court has mandated just such scrupulously careful review. Independent review of the entire record in such cases is the only means of assuring that the standards established in *Sullivan* and its progeny will be followed.

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9 The figures set forth in this paragraph are the results of a study undertaken by the *amici*, which is annexed to this brief as Annex A. The figures are consistent with a recently completed study undertaken by the Libel Defense Resource Center, an information clearinghouse that monitors developments in the defamation field. LDRC Study, "Independent Appellate Review in Libel Actions Since *New York Times* v. *Sullivan*," to be published in LDRC Bulletin No. 7 (July 15, 1983).

10 *See, e.g., 1982 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (19.2% of private civil actions not including prisoner petitions reversed or denied); *1981 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (19% of private civil actions not including prisoner petitions reversed or denied); *1980 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (18.6% of private civil actions reversed or denied); *1979 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (18.9% of private civil actions reversed or denied).

C. The Applicability Of Rule 52(a) Of The Federal Rules Of Civil Procedure

Rule 52(a) requires that in all actions tried without a jury or with an advisory jury the district court "shall find the facts specially and state separately its conclusions of law thereon. . . ." The district court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A district court's conclusions of law or its application of legal principles to established fact, however, are not subject to the clearly erroneous standard of review. *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982).

This Court has adverted to "the vexing nature of the distinction between questions of fact and questions of law," *Pullman-Standard* v. *Swint*, *supra*, 456 U.S. at 288, as well as to the failure of Rule 52 to "furnish particular guidance with respect to distinguishing law from fact." *Id.* Although the Court has expressly declined to decide whether the Rule 52(a) standard applies to mixed questions of law and fact, it has observed that there is support in its decisions for the proposition that an appellate court may review independently district court conclusions on such questions. *Pullman-Standard* v. *Swint*, *supra*, 456 U.S. at 289 n.19. Whether one labels the determination a conclusion of law, the application of law to fact, or even a mixed question of law and fact, the clear holding of the unbroken line of decisions by this Court cited above is that the determination of the adequacy of the evidence to support a conclusion of actual malice is reviewable independently by the appellate courts and is not subject to the more limited standard available under Rule 52.

The Court of Appeals correctly concluded that in conducting its review it was "not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a)" but must "independently examin[e] the record to ensure that the district court has applied properly

the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 692 F.2d 189, 195 (1st Cir. 1982).

Rule 52(a)'s clearly erroneous standard is inapplicable to review of actual malice determinations for several reasons. As discussed above, the independent review process does not entail a re-examination of the district court's judgments on credibility. Indeed, the Court of Appeals here expressly acknowledged that it was "in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact." 692 F.2d at 195.[11]

Similarly, while it reached a conclusion contrary to the district court as to the sufficiency of the evidentiary record to support a determination of actual malice, the Court of Appeals did not reject, or make contrary findings on, any matters of historical fact found by the district court. Thus, regarding those matters as to which Rule 52(a) applied, its limitations were observed. Rule 52(a) was appropriately recognized as being inapplicable to the district court's conclusion that actual malice had been established by clear and convincing evidence.

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11 Petitioner contends that the Court of Appeals disregarded or rejected the district court's credibility judgment as to Seligson's testimony that he regarded the phrases "about the room" and "along the wall" as substantially synonymous. That contention, however, is predicated on a misperception of what the appellate court concluded. The Court of Appeals did not dispute the district court's right to make a credibility determination, but rather the permissibility of the conclusion the district court reached from what was an objective, not a subjective approach to actual malice. The district court determined that petitioner had established subjective actual malice by clear and convincing proof based solely on the court's conclusion that no reasonable man in Seligson's position could have interpreted the two phrases as meaning the same thing. As the Court of Appeals correctly held, the district court's conclusion was tantamount to finding actual malice based on proof of falsity alone and, as such, was improper as a matter of law. It was not any credibility assessment that the Court of Appeals questioned; it was the qualitative and quantitative significance that could, consistent with constitutional principles, appropriately be attributed to the district court's conclusion that no reasonable man could have understood the words as Mr. Seligson did.

The independent appellate review process is thus not addressed to Rule 52(a) "findings of fact" at all but to the cumulative effect of the evidentiary record adduced to establish actual malice. As this Court stated in *Baumgartner, supra*, 322 U.S. at 671, and recently reaffirmed in *Pullman-Standard* v. *Swint, supra*, 456 U.S. at 286 n.16, in cases in which a clear and convincing standard of proof applies, "the conclusion of the two lower courts that the exacting standard of proof had been satisfied was not an unreviewable finding of fact but one that a reviewing court could independently assess." In such circumstances, the lower courts' "conclusions" are not "pure findings of fact" subject to the limitations of Rule 52(a), but "findings that 'clearly impl[y] the application of standards of law.' " *Pullman-Standard* v. *Swint, supra*, 456 U.S. at 286 n.16, *quoting Baumgartner* v. *United States, supra*, 322 U.S. at 671.[12]

In fact, when a "trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard," *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982). *See also Pullman-Standard* v. *Swint, supra*, 456 U.S. at 287 ("if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis"); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963) (a district court's "conclusion derived from [its] application of an improper standard to the facts . . . may be corrected as a matter of law"). Based on its review of the record, the Court of Appeals concluded that "[t]o find actual malice in this case would be to interpret that concept to require little more than proof of falsity. . . ." Such a misinterpreta-

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12 *See also Watts* v. *Indiana*, 338 U.S. 49, 51 (1949):

> " '[I]ssue of fact' is a coat of many colors. It does not cover a conclusion drawn from incontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication."

tion by a district court of the applicable constitutional standards is plainly correctable as a matter of law by an appellate court.

CONCLUSION

So slight is the distinction between words the trial court would have held non-actionable—"tended to wander along the wall"—and the words actually used by Consumers Union—"tended to wander about the room"—that there is some temptation in this case to discount its import. But the very triviality of these verbal distinctions accentuates the risks of this action. If critical reviews are to be subjected to such narrowly focused second-guessing, their continued viability as a genre of commentary inevitably would be endangered.

Similarly, although the issue of the appropriate scope of appellate review is one not necessarily presented by this appeal, any retreat in this case from the law as previously declared and as interpreted by the Court of Appeals would threaten all journalism. As the twentieth anniversary of one of the monuments of this Court, *New York Times Co.* v. *Sullivan*, approaches, it is time to reaffirm the continued strength of the foundations on which it rests.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Amici Curiae

Of Counsel:

DEAN RINGEL
KENNETH E. MEISTER
DEVEREUX CHATILLON
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)

Of Counsel:

Katherine P. Darrow, Esq.
General Counsel
George Freeman, Esq.
The New York Times Company
229 West 43rd Street
New York, New York 10036
Attorneys for The New York Times Company

Allen Y. Shaklan, Esq.
Howard F. Jaeckel, Esq.
CBS Law Department
51 West 52nd Street
New York, New York 10019
Attorneys for CBS, Inc.

Robert Sack, Esq.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10020
Attorney for Dow Jones & Company, Inc.

A. Buffum Lovell, Esq.
Vice President and General Counsel
Dun & Bradstreet, Inc.
One Diamond Hill Road
Murray Hill, N.J. 07974-0027
Attorney for The Dun & Bradstreet Corporation

Alice Neff Lucan, Esq.
Gannett Co., Inc.
55 Exchange Street
Rochester, New York 14614
Attorney for Gannett Co., Inc.

Corydon B. Dunham, Esq.
Executive Vice President and General Counsel
Sandra Baron, Esq.
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, New York 10020
Attorneys for National Broadcasting Company, Inc.

Diana M. Daniels, Esq.
Vice President and General Counsel
Newsweek, Inc.
444 Madison Avenue
New York, New York 10022
Attorney for Newsweek, Inc.

David Otis Fuller, Jr., Esq.
Christopher Goff, Esq.
The Reader's Digest Association, Inc.
200 Park Avenue
New York, New York 10016
Attorneys for The Reader's Digest Association, Inc.

W. Terry Maguire, Esq.
Vice President/General Counsel
The American Newspaper
Publishers Association
Box 17407
Dulles International Airport
Washington, D.C. 20041
Attorney for The American Newspaper Publishers Association

Richard M. Schmidt, Jr., Esq.
Cohn & Marks
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorney for The American Society of Newspaper Editors

R. Bruce Rich, Esq.
Weil Gotshal & Manges
767 Fifth Avenue
New York, New York 10043
Attorney for The Association of American Publishers, Inc.

Peter C. Gould, Esq.
350 Madison Avenue
New York, New York 10017
Barbara Ann Cook, Esq.
1221 Avenue of the Americas
New York, New York 10020
Attorneys for The Magazine Publishers Association

Jack C. Landau, Esq.
800 18th Street, N.W., Suite 300
Washington, D.C. 20006
Attorney for The Reporters Committee for Freedom of the Press

ANNEX A

From 1964, when *New York Times Co.* v. *Sullivan* was decided, through the end of 1982, the federal Courts of Appeals ruled on the issue of whether actual malice had been established on the record in 61 reported defamation cases. These appeals were resolved as follows:

Party Appealing	*Affirmed*	*Reversed*	*Total*
Plaintiff	31	10	41
Defendant	6	14	20
Total	37	24	61

While 39% of these cases were reversed on an overall basis, 70% of the appeals initiated by the defendant resulted in reversal. When appeals of summary judgment and dismissal rulings are eliminated from consideration and only appeals from trials are considered, 25 cases remain and the results differ somewhat:

Party Appealing	*Affirmed*	*Reversed*	*Total*
Plaintiff	8	3	11
Defendant	4	10	14
Total	12	13	25

In 52% of these appeals, which followed trials, the district court was reversed on the issue of actual malice. Of these cases in which the defendant was the appellant, 71% were reversed.

The frequency of "actual malice" reversals may be contrasted with the overall 19% reversal and denial rate in the Courts of Appeals for all civil actions that do not involve the United States. *See, e.g., 1982 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (19.2% of private civil actions not including prisoner petitions reversed or denied); *1981 Annual Report of the Director of the Administrative Office of the United States*

Courts, Table B-1 (19% of private civil actions not including prisoner petitions reversed or denied); *1980 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (18.6% of private civil actions reversed or denied); *1979 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (18.9% of private civil actions reversed or denied).

The methodology for the study was as follows. A LEXIS search was made for all reported cases decided by the federal Courts of Appeals through December 31, 1982, in which *New York Times Co.* v. *Sullivan* was cited and the words "actual malice" appeared. This initial search yielded 133 cases. This list was supplemented by and checked against the circuit court citations to *New York Times Co.* v. *Sullivan* compiled in Shepard's Federal Citations. In addition, the Libel and Slander topic of West's Federal Practice Digest 2d was examined in order to ensure that no cases were overlooked. After the elimination of those decisions that were not defamation cases and those defamation cases that did not include a discussion or holding on the actual malice standard that was either the sole or an alternate basis for the Court's opinion, the 61 cases referenced here remained.

I. Appeals by plaintiff; judgment affirmed (31 cases)

1. *Gaines* v. *Cuna Mutual Insurance Society*, 681 F.2d 982 (5th Cir. 1982) (summary judgment for defendant affirmed in case in which no evidence as to actual malice presented)
2. *Schultz* v. *Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982) (summary judgment for defendants affirmed because no evidence as to actual malice presented)
3. *Street* v. *National Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. dis'd*, 454 U.S. 1095 (1981) (directed verdict for defendant affirmed in case in which no evidence as to actual malice presented)

4. *Church of Scientology* v. *Cazares*, 638 F.2d 1272 (5th Cir. 1981) (summary judgment for defendant affirmed because statement not capable of defamatory meaning and actual malice not proven)

5. *Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264 (3d Cir. 1980) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

6. *Yiamouyiannis* v. *Consumers Union of United States, Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980) (summary judgment for defendant affirmed because no evidence as to actual malice presented)

7. *Long* v. *Arcell*, 618 F.2d 1145 (5th Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981) (judgment n.o.v. for defendant affirmed because actual malice not proven)

8. *Dickey* v. *CBS Inc.*, 583 F.2d 1221 (3d Cir. 1978) (judgment for defendant affirmed because actual malice not proven)

9. *Rosanova* v. *Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

10. *Hutchinson* v. *Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979) (summary judgment for defendant affirmed in case in which actual malice not proven)

11. *Wolston* v. *Reader's Digest Ass'n*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd on other grounds*, 443 U.S. 157 (1979) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

12. *Arnheiter* v. *Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978) (summary judgment for defendant affirmed because no evidence as to actual malice)

13. *Pierce* v. *Capital Cities Communications, Inc.*, 576 F.2d 495 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978) (summary judgment for defendant affirmed in case in which no evidence as to actual malice presented)

14. *Meeropol* v. *Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (summary judgment for defendant on defamation claim affirmed in case in which there was no issue of material fact as to actual malice)

15. *Fadell* v. *Minneapolis Star & Tribune Co.*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977) (summary judgment for defendant affirmed in case in which no evidence as to actual malice presented)

16. *Walker* v. *Cahalan*, 542 F.2d 681 (6th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

17. *Grzelak* v. *Calumet Publishing Co.*, 543 F.2d 579 (7th Cir. 1975) (summary judgment for defendant affirmed in case in which actual malice not proven)

18. *Vandenburg* v. *Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975) (judgment n.o.v. for defendant affirmed because actual malice not proven)

19. *Perry* v. *Columbia Broadcasting System, Inc.*, 499 F.2d 797 (7th Cir.), *cert. denied*, 419 U.S. 883 (1974) (summary judgment for defendant affirmed in case in which actual malice not proven)

20. *Gertz* v. *Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972), *rev'd on other grounds*, 418 U.S. 323 (1974) (judgment n.o.v. for defendant affirmed because actual malice not proven)

21. *Mistrot* v. *True Dectective Publishing Corp.*, 467 F.2d 122 (5th Cir. 1972) (*per curiam*) (summary judgment for defendant affirmed because no material issue of fact as to actual malice)

22. *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (summary judgment for defendant affirmed in case in which actual malice not proven)

23. *Casano* v. *WDSU-TV, Inc.*, 464 F.2d 3 (5th Cir. 1972) (directed verdict for defendant affirmed in case in which evidence as to malice was insufficient)

24. *Waskow* v. *Associated Press*, 462 F.2d 1173 (D.C. Cir. 1972) (*per curiam*) (summary judgment for defendant affirmed because no evidence as to actual malice presented)

25. *Cerrito* v. *Time, Inc.*, 449 F.2d 306 (9th Cir. 1971) (*per curiam*) (summary judgment for defendant affirmed in case in which actual malice not proven)

26. *Medina* v. *Time, Inc.*, 439 F.2d 1129 (lst Cir. 1971) (*per curiam*) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

27. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970) (summary judgment for defendant affirmed because no evidence as to actual malice existed)

28. *United Medical Laboratories* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969) (summary judgment for defendant affirmed in case in which no evidence as to actual malice existed)

29. *Walker* v. *Pulitzer Publishing Co.*, 394 F.2d 800 (8th Cir. 1968) (summary judgment for defendant affirmed because no evidence as to actual malice existed)

30. *Baldine* v. *Sharon Herald Co.*, 391 F.2d 703 (3d Cir. 1968) (judgment n.o.v. for defendant affirmed because actual malice not proven)

31. *Pauling* v. *Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967) (judgment for defendant on jury verdict affirmed in case in which actual malice not proven)

II. Appeals by plaintiff; judgment reversed (10 cases)

1. *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 1277 (1983) (summary judgment for defendant reversed in case in which issue of material fact existed as to actual malice)

2. *Rebozo* v. *Washington Post Co.*, 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981) (summary judgment for defendant reversed because issue of material fact existed as to actual malice)

3. *Carson* v. *Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (summary judgment for defendants reversed because evidence suggested plaintiffs could prove actual malice)

4. *Alioto* v. *Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975) (judgment n.o.v. for defendant reversed because evidence was sufficient for jury to draw inference of actual malice)

5. *Guam Federation of Teachers* v. *Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974) (directed verdict for defendant reversed because evidence was sufficient for issue of actual malice to be decided by jury)

6. *Gordon* v. *Random House, Inc.*, 486 F.2d 1356 (3d Cir. 1973), *vacated*, 419 U.S. 812 (1974) (summary judgment for defendant reversed in case in which genuine issue of material fact existed as to reckless disregard)

7. *Wasserman* v. *Time, Inc.*, 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970) (summary judgment for defendant reversed in case in which question of actual malice was for the jury)

8. *Pape* v. *Time, Inc.*, 419 F.2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279 (1971) (directed verdict for defendant reversed because evidence of actual malice was sufficient for submission to jury)*

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* In its opinion in *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), this Court emphasized that it was familiar with and approved of appellate courts' re-examination of "the evidentiary basis" upon which lower court decisions bearing on constitutional rights rested. See text at p. 12, *supra*.

9. *Walker* v. *Courier-Journal and Louisville Times Co. Inc.*, 368 F.2d 189 (6th Cir. 1966) (*per curiam*) (dismissal of complaint reversed because plaintiff should have opportunity to offer evidence on actual malice)

10. *Pape* v. *Time, Inc.*, 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966) (summary judgment for defendant reversed in case in which issue of material fact existed as to actual malice)

III. Appeals by defendant; judgment affirmed (6 cases)

1. *Alioto* v. *Cowles Communications, Inc.*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) (judgment for plaintiff affirmed in case in which district court found existence of actual malice)

2. *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (remitted judgment for plaintiff affirmed in case in which actual malice was proved)

3. *Davis* v. *Schuchat*, 510 F.2d 731 (D.C. Cir. 1975) (judgment for plaintiff affirmed because there was adequate evidence of actual malice)

4. *Vandenburg* v. *Newsweek, Inc.*, 441 F.2d 378 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971) (denial of defendant's motion for summary judgment affirmed because defendant failed to show no issue of material fact existed as to actual malice)

5. *Time, Inc.* v. *Ragano*, 427 F.2d 219 (5th Cir. 1970) (denial of defendant's motion for summary judgment affirmed because genuine issue of material fact as to actual malice did exist)

6. *Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (judgment for plaintiff on jury verdict affirmed in case in which evidence of actual malice did exist)

IV. Appeals by defendant; judgment reversed (14 cases)

1. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 692 F.2d 189 (lst Cir. 1982), *cert. granted*, 51 U.S.L.W. 3774 (1983) (judgment for plaintiff reversed because evidence did not establish actual malice)

2. *Ryan* v. *Brooks*, 634 F.2d 726 (4th Cir. 1980) (judgment for plaintiff on jury verdict reversed because evidence did not establish actual malice)

3. *Brewer* v. *Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981) (judgment for plaintiff on jury verdict reversed because evidence did not establish actual malice)

4. *Orr* v. *Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (jury verdict for plaintiff reversed in case in which evidence did not establish actual malice)

5. *Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) (judgment for plaintiff on jury verdict reversed in case in which evidence did not establish actual malice)

6. *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977) (judgment for plaintiff on jury verdict reversed in case in which evidence did not establish actual malice)

7. *Drotzmanns, Inc.* v. *McGraw-Hill, Inc.*, 500 F.2d 830 (8th Cir. 1974) (judgment for plaintiff on jury verdict reversed and case remanded for new trial in case in which evidence did not establish actual malice)

8. *Firestone* v. *Time, Inc.*, 460 F.2d 712 (5th Cir.), *cert. denied*, 409 U.S. 875 (1972) (judgment for plaintiff reversed because evidence did not establish actual malice)

9. *Time, Inc.* v. *Johnston*, 448 F.2d 378 (4th Cir. 1971) (denial of defendant's motion for summary judgment reversed because there was no issue of material fact as to actual malice)

10. *Dacey* v. *Florida Bar, Inc.*, 427 F.2d 1292 (5th Cir. 1970) (denial of defendant's motion for summary judgment reversed because there was no issue of material fact as to actual malice)

11. *Rosenbloom* v. *Metromedia, Inc.*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971) (remitted judgment for plaintiff reversed because evidence did not establish actual malice)

12. *Time, Inc.* v. *McLaney*, 406 F.2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969) (denial of defendant's motion for summary judgment reversed because there was no issue of material fact as to actual malice)

13. *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (denial of defendant's motion for summary judgment reversed because no issue of material fact as to actual malice)

14. *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966) (judgment for plaintiff on jury verdict reversed because evidence did not establish actual malice)